STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MICHAEL S. TAYLOR	:	DETERMINATION DTA NO. 813700
for Redetermination of a Deficiency or for Refund of New York State and New York City Personal Income Taxes under Article 22 of the Tax Law and the New York City Administrative Code for the Year 1988.	:	

Petitioner, Michael S. Taylor, 444 East 82nd Street, New York, New York 10028, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the year 1988.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on January 30, 1996 at 9:15 A.M., with all briefs to be submitted by June 20, 1996, which date began the six-month period for the issuance of this determination. Petitioner appeared by Richardson Mahon & Casey, P.C. (James J. Mahon, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Laura J. Witkowski, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation timely and properly issued a Notice of Deficiency to petitioner.

II. If not, whether assertion of a penalty, imposed pursuant to Tax Law § 685(g), is now time barred.

III. Whether the fact that the Notice and Demand for Payment of Tax Due, issued by the Division of Taxation to petitioner on March 1, 1993,erroneously listed the company for which

petitioner was determined to have been a responsible officer as "Mostel & Taylor Investments" rather than "Mostel & Taylor Securities, Inc.", is a fatal defect which thereby renders it a nullity.

IV. Whether petitioner was a person required to collect, truthfully account for and pay over withholding taxes on behalf of Mostel & Taylor Securities, Inc., who willfully failed to do so or who willfully attempted to evade or defeat the tax or the payment thereof pursuant to the provisions of Tax Law § 685(g), and, therefore, is subject to the penalty provided for in that section.

FINDINGS OF FACT

1. According to the affidavit of David Schaible of the Withholding Tax Unit of the Division of Taxation ("Division"), a Form IT-2103, Year-end Reconciliation, was received on January 17, 1990 for the 1988 tax year from "Mostel & Taylor Investments" indicating that a total of $74,100.00 had been withheld from its employees for the year (see, Division's Exhibit "D"). The IT-2103 contained the ID Number WD113090543. The signature line was blank; however, it was dated January 29, 1989, and the title "President" was filled in on the line provided for the title of the person completing the form (the original IT-2103 is attached to Division's Exhibit "D").

2. On February 20, 1990, the Division issued a Notice and Demand for Unpaid Withholding Tax Due to Mostel & Taylor Investments, 919 3rd Avenue, New York, NY 10022 which demanded payment of $74,100.00 in tax withheld, plus penalty and interest, for a total amount due of $110,480.00 for the year 1988 (see, Division's Exhibit "E").

3. The Division issued a Notice of Deficiency, dated June 7, 1991, to Michael Taylor ("petitioner") at 444 East 82nd Street, New York, NY 10028. The Notice of Deficiency asserted a penalty in the amount of $74,100.00 for the year 1988. The identification number listed on the notice was 113090543. Petitioner denies having ever received the Notice of Deficiency although he acknowledged that he lived at 444 East 82nd Street in New York City on the date on which the Division contends that it issued the notice and for many years prior thereto.

4. On March 1, 1993, the Division issued a Notice to Taxpayer as well as a Notice and Demand for Payment of Tax Due to petitioner in the amount of $74,100.00 which indicated that he was liable as an officer/responsible person for a penalty, imposed pursuant to Tax Law § 685(g), in an amount equal to the unpaid withholding tax of Mostel & Taylor Investments. The notice and demand was sent to petitioner at 444 East 82nd Street, New York, NY 10028-5903. Petitioner acknowledges that he received these notices in March 1993.

5. Petitioner was the president of Mostel and Taylor Securities, Inc., a company with offices located at 919 Third Avenue, New York, New York 10022. The business was incorporated in the State of New York on October 14, 1981 (see, Division's Exhibit "N"). During the year at issue and for years prior thereto, petitioner was an investment banker for Mostel and Taylor Securities, Inc.

6. Petitioner testified that he initially contributed approximately $50,000.00 toward the organization of the company and owned 16 2/3 percent of its stock. He stated that Leonard Osser joined the company in the middle of 1987 at which time Mr. Osser became a vice-president. Petitioner and Bennett Mostel were the other officers at that time. Mostel left the company in late 1987. Osser was put in charge of all operational matters including maintaining the books, filing tax returns and supervising the sales department.

In 1988 there were 11 stockholders of the company, and petitioner owned 12 to 13 percent of the stock. The board of directors consisted of petitioner, Leonard Osser, Neil Voorsanger and Richard Hodgson. The board met quarterly and, at its meetings, discussed whether the company was paying its taxes. At one of the board meetings, it was decided that petitioner would no longer be permitted to sign checks alone because Osser wanted to monitor the checkbook more closely.

7. Petitioner's earnings from Mostel and Taylor Securities, Inc. (approximately $40,000.00 to $50,000.00 per year) were his sole source of income during the year at issue. He devoted all of his time to the business of the company. As president, petitioner had the

authority to hire and fire employees. However, since Leonard Osser was the operating officer, petitioner stated that he did not exercise this power without Osser's consent.

8. While Leonard Osser provided financial statements to the board of directors which showed taxes paid or taxes accrued on both balance sheets and income statements, petitioner never saw checks or copies of checks evidencing payment. Petitioner took no specific action to insure that Osser was filing New York State withholding tax returns and remitting payment. It was petitioner's understanding that this was Osser's responsibility and "I left the delegated responsibilities that were delegated to him to do."

The business began failing in late 1988. In January 1989, $250,000.00 was raised to recapitalize the company (petitioner raised about $200,000.00 of this amount). After recapitalization, petitioner stated that he believed the company was current with all of its creditors.

The company ceased doing business in May 1989. At that time, petitioner was aware that the company owed Federal withholding taxes. Leonard Osser told him that they had "a huge Federal tax problem." When petitioner asked whether New York State withholding taxes were owed, he was told that they had been paid. Petitioner did not investigate this statement himself as he was trying to find jobs for the people who worked for the company and was trying to close the business.

9. In June or July 1990, petitioner filed for personal bankruptcy. He included the Federal government among his creditors because it was alleging that taxes were due and owing and was trying to recover such taxes from petitioner. On the advice of his attorney, he also included New York State as a creditor despite not knowing that any taxes were due to the State.

10. In his capacity as president of Mostel and Taylor Securities, Inc., petitioner signed the following documents:

a. Form CT-5, Application for Automatic Six-Month Extension for Filing Tax Report or Return for the period March 1, 1987 through February 29, 1988 (see, Division's Exhibit "H");

b. Form CT-4, New York State Corporation Franchise Tax Report for the period November 18, 1986 through February 28, 1987 (see, Division's Exhibit "I");

c. Form CT-3M/4M, New York State Metropolitan Transportation Business Tax Surcharge Report for the period November 18, 1986 through February 28, 1987 (see, Division's Exhibit "J");

d. Form CT-3S, S Corporation Information Report for the periods March 1, 1984 through February 28, 1985 (see, Division's Exhibit "M"), March 1, 1985 through February 28, 1986 (see, Division's Exhibit "L"), and March 1, 1986 through November 17, 1986 (see, Division's Exhibit "K");

e. Form CT-6, Election by Shareholders of a Small Business Corporation for New York State Personal Income Tax and Corporation Franchise Tax Purposes which was signed on December 28, 1983;

f. Forms IT-2101, Return of Tax Withheld for various months during tax years 1984, 1985 and 1986 along with a Form IT-2103, Reconciliation for 1985 (see, Division's Exhibit "O").

1. In contrast to petitioner's testimony (see, Finding of Fact "6"), the S corporation information reports reveal that for the period ended February 28, 1985 and for the period ended November 17, 1986, petitioner owned 24.56 percent of the company's stock; for the period ended February 28, 1986, he owned 32.55 percent. A schedule K-1 attached to the report filed for the period March 1, 1986 through November 17, 1986 (see, Division's Exhibit "K") also indicates that Leonard Osser was a 24.56 percent shareholder during that time.

12. As proof of its proper and timely issuance of the notice of deficiency, the Division submitted an affidavit of Michael J. O'Reilly of its Tax Compliance Division, an affidavit of Daniel LaFar of the Division's Mail and Supply Room, and copies of the notice of deficiency and the mailing log (Postal Form 3877). The mailing log consists of a one-page document

indicating that, on June 7, 1991, 15 articles were allegedly mailed by "New York State Taxation & Finance". One of these articles was addressed to Michael Taylor at 444 E. 82 Street, New York, N.Y. 10028. The article number of this mailing was 539033, the postage was $.52 and the fee was $1.00. At the bottom of the form, "Total number of Pieces Listed by Sender", "Total number of Pieces Received at Post Office" and "Postmaster, Per (Name of receiving employee)" are blank.

13. Mr. O'Reilly's affidavit describes the procedures of the Tax Compliance Division in preparing a mailing log for each set of notices mailed by certified mail each day. It states that the notice as well as a blank power of attorney form and a blank request for conciliation conference form are inserted into the envelope. A certified mail number is then listed on each envelope and entered on the mailing log. The envelopes are compared with the mailing log to verify that all notices are accounted for. The unsealed envelopes and the mailing log are then transferred by a Tax Compliance Division clerk to the Division's outgoing mail unit for delivery to the United States Postal Service.

The outgoing mail unit delivers the notices to the United States Postal Service which stamps the certified mailing log to show that all pieces of mail listed thereon were received at the U.S. post office. One copy of the certified mailing log is returned to the Tax Compliance Division.

Mr. O'Reilly states that on the mailing log attached to his affidavit, there were 15 pieces of mail listed as having been sent to the U.S Postal Service on June 7, 1991. It is the practice of his office that if any of the notices listed on the Form 3877 are not included in the mailing, the reference to the excluded notice on the form is crossed out and no postage is charged for such notice. Since no names or addresses are crossed out on the form at issue herein and since postage and fees were charged for all notices contained on the form, it is Mr. O'Reilly's contention that all notices listed on the Form 3877 accompanied the form to the post office. Mr. O'Reilly stated that it appears that the certified mailing of the notice of deficiency to petitioner at 444 East 82nd Street, New York, NY 10028 was in compliance with the Tax Compliance

Division procedures and that he was unaware of any problems which arose with respect to executing these procedures.

14. The affidavit of Daniel LaFar of the Division's Mail and Supply Room states that his regular duties include the supervision of staff in delivering outgoing mail to branch offices of the U.S. Postal Service. After a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of his staff weighs and seals each envelope, places postage and fee amounts on the letters and records the postage and fee amounts on the mail record. A mail room clerk then counts the envelopes and verifies the names and certified mail numbers against the information contained on the mail record. A member of the mail room staff then delivers the stamped envelopes to the Roessleville Branch of the United States Postal Service in Albany, New York. The postal employee affixes a postmark to the certified mail record to indicate receipt by the postal service.

Mr. LaFar's affidavit states that, in the present matter, the postal employee placed a postmark on the certified mail record to indicate that 15 pieces were received at the post office on June 7, 1991. In the ordinary course of business and pursuant to the practices and procedures of the Mail and Supply Room, the certified mail record is picked up at the post office the following day and is delivered to the originating office by a member of Mr. LaFar's staff. From a review of Michael J. O'Reilly's affidavit as well as copies of the notice and the mailing record, Mr. LaFar states that he can determine that on June 7, 1991, an employee of the Mail and Supply Room delivered a piece of certified mail addressed to Michael Taylor, 444 E. 82 Street, New York, NY 10028 to the Roessleville Branch of the United States Post Office in Albany, New York in a sealed postpaid envelope for delivery by certified mail. Mr. LaFar further states that the procedures described in his affidavit are the regular procedures followed by the Mail and Supply Room staff in the ordinary course of business when handling items to be sent by certified mail, and that those procedures were followed in mailing the notice at issue herein.

CONCLUSIONS OF LAW

A. Tax Law § 681(b) provides that:

> "[a]fter ninety days from the mailing of a notice of deficiency, such notice shall be an assessment of the amount of tax specified in such notice, together with the interest, additions to tax and penalties stated in such notice, except only for any such tax or other amounts as to which the taxpayer has within such ninety day period filed with the [Division of Tax Appeals] a petition . . . ."

B. Until a notice of deficiency has been mailed, "[n]o assessment of a deficiency in tax and no levy or proceeding in court for its collection shall be made" (Tax Law § 681[c]).

To be "properly mailed," the notice must be mailed by registered or certified mail to the taxpayer's last known address (Tax Law § 681(a); see, Matter of Agosto v. Tax Commn. of State of New York, 68 NY2d 891, 508 NYS2d 934, 935; Matter of MacLean v. Procaccino, 53 AD2d 965, 386 NYS2d 111, 112; Matter of Katz, Tax Appeals Tribunal, November 3, 1994). Once deemed "properly mailed," the "risk of nondelivery" is on the taxpayer; that is, once a notice is properly mailed, Tax Law § 681(a) does not require actual receipt by the taxpayer (Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, affd 43 AD2d 815, 350 NYS2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025). Rather, whether or not the notice is actually received, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Matter of Katz, supra, citing Dorff v. Commissioner, 55 TCM 412; Cataldo v. Commissioner, 60 TC 522). However, the "presumption of delivery" does not arise unless or until sufficient evidence of mailing has been produced (see, Matter of MacLean v. Procaccino, supra; Matter of Katz, supra).

C. To prove that a Notice of Deficiency was issued to a taxpayer on a particular date, the mailing evidence required of the Division is two-fold: first, there must be proof of a standard procedure used by the Division for the issuance of notices by one(s) with knowledge of the relevant procedures; and second, there must be proof that the standard procedure was followed

in the particular instance in question (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991).

A properly completed Postal Form 3877, reflecting Postal Service receipt of the items listed on the form, represents direct documentary evidence of the date and fact of mailing (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992; see also, Coleman v. Commr., 94 TC 82; Wheat v. Commr., 63 TCM [CCH] 2955).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures through the affidavits of Mr. O'Reilly and Mr. LaFar, Division employees involved in the process of generating, issuing and mailing notices of deficiency (see, Finding of Fact "11"). The Division has not, however, met its burden of proving that the standard procedure was followed in this particular instance.

The LaFar affidavit states that "the postal employee placed a Postmark on the certified mail record to indicate that 15 pieces were received at the Post Office on June 7, 1991." But the affidavit does not state the basis for that conclusion since the certified mail record is blank in the spaces provided for the number of pieces listed by the sender and received by the post office. In addition, no signature or initials of the Postal Service employee who allegedly received the items appears on the certified mail record. Therefore, the certified mail record does not establish that each of the 15 pieces of mail listed on the one-page document was received by the Postal Service (see, Matter of Sabando Auto Parts, Tax Appeals Tribunal, March 9, 1995; Matter of Auto Parts Ctr., Tax Appeals Tribunal, February 9, 1995; Matter of Turek, Tax Appeals Tribunal, January 19, 1995). Without knowing the basis for the affiant's conclusion that each of the 15 pieces was received at the post office on June 7, 1991, the LaFar affidavit cannot make up for the deficiencies in the documentary evidence (see, Matter of Roland, Tax Appeals Tribunal, February 22, 1996). Therefore, the Division has failed to meet its burden of proving that the notice of deficiency was timely and properly issued to petitioner.

E. While the remedy would ordinarily be to cancel the notice of deficiency, the present circumstances are somewhat unusual. This case involves an assertion by the Division that

petitioner is liable for a penalty, imposed pursuant to Tax Law § 685(g) in an amount equal to the withholding tax liability of Mostel and Taylor Securities, Inc. based on its determination that he was a person/officer responsible therefor.

While the usual statute of limitations for any tax imposed under Article 22 of the Tax Law is three years after the return was filed (Tax Law § 683[a]), that statute of limitations does not apply to imposition of penalties against corporate officers for the corporation's failure to remit withholding taxes (see, Layden v. Tax Appeals Tribunal of State of New York, _ AD2d _, 642 NYS2d 449; Matter of Wolstich v. New York State Tax Commn., 106 AD2d 745, 483 NYS2d 779).

If the notice of deficiency in this matter is cancelled herein, the Division may simply reissue another notice to petitioner which asserts the same penalty for the same period. Petitioner would then be compelled to file another petition for an administrative hearing (or request for a conciliation conference) with the ultimate result being that the parties would again be before this forum litigating the exact same issues. Even if petitioner never received the actual notice of deficiency until the hearing held herein, there was absolutely no prejudice to petitioner since he was clearly apprised of the basis of the Division's assertions that he was being held liable for a penalty equal to the amount of withholding taxes owed by Mostel and Taylor Securities, Inc. This is true because he acknowledges receipt of the notice and demand issued by the Division on March 1, 1993 (see, Finding of Fact "4"). To force both parties to again issue and file their notices and pleadings to enable petitioner to obtain that which, by his filing of his present petition, is what he has sought, i.e., his "day in court", makes no sense in light of the considerable expenditures of time and effort (not to mention additional financial considerations) which would be needed to reach the same result. That being the case, the notice of deficiency is hereby deemed to have been served upon petitioner, all pleadings are deemed to have been timely and properly filed and served, and the substantive issues raised by petitioner shall hereinafter be considered.

F. Turning to petitioner's contention that the Notice and Demand for Payment of Tax Due was defective because it stated that petitioner was being held to be an officer/responsible person of "Mostel and Taylor Investments" rather than the correct company name of "Mostel and Taylor Securities, Inc.", such contention must be dismissed for a number of reasons.

First, the statutory notice, i.e., the Notice of Deficiency (which petitioner maintains that he did not receive) does not contain this error; it is only the notice and demand which contains the incorrect corporate name.

Second, it must be pointed out that it was the filing of the year-end reconciliation, Form IT-2103 (see, Finding of Fact "1"), which gave rise to the issuance of the notice of deficiency and the subsequent notice and demand by the Division. The Form IT-2103 admittedly contains two errors, i.e., the taxpayer's name ("Mostel & Taylor Investments") and the ID number ("WD113090543" when the actual employer's identification number of Mostel and Taylor Securities, Inc. is 13-3090543 [the second digit is incorrect]). While it cannot be determined herein that petitioner filed the IT-2103 (and he maintains that he did not), whoever did file the form on behalf of the company took no steps to correct the aforementioned errors. Moreover, the fact that the identification numbers and company names were so similar and that the address (919 Third Avenue, New York, NY 10022) was identical should have, at the very least, put petitioner on notice that his alleged liability for the penalty at issue herein was derived from his status as an officer/responsible person of Mostel and Taylor Securities, Inc.

Both the courts and the Tax Appeals Tribunal have repeatedly held that, absent evidence of harm or prejudice to the petitioner, defects on the face of a notice will not invalidate the notice (Matter of Agosto v. Tax Commn., 68 NY2d 891, 508 NYS2d 934; Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892; Matter of A & J Parking Corp., Tax Appeals Tribunal, April 9, 1992; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989). In the present matter, petitioner has neither alleged nor proven any harm or prejudice occurring as a result of the errors on the notice and demand. Accordingly, petitioner's contentions with respect to these errors must be dismissed.

G. With regard to the withholding tax penalty asserted against petitioner, Tax Law § 685(g) provides:

> "Willful failure to collect or pay over tax.--Any person required to collect, truthfully account for, and pay over the tax imposed by this article who willfully fails to collect such tax or truthfully account for and pay over such tax or willfully attempts in any manner to evade or defeat the tax or the payment thereof, shall, in addition to other penalties provided by law, be liable to a penalty equal to the total amount of the tax evaded, or not collected, or not accounted for and paid over."

Tax Law § 685(n) provides the following definition of "persons" subject to the section 685(g) penalty:

> "[T]he term person includes an individual, corporation or partnership or an officer or employee of any corporation (including a dissolved corporation), or a member or employee of any partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs."

H. The question of whether someone is a "person" under a duty to collect and pay over withholding taxes is a factual one, similar in scope and analysis to the question of whether one is a responsible individual for sales and use tax purposes. Factors which should be considered are, inter alia, whether the particular individual signed tax returns, derived a substantial part of his income from the corporation, or had the right to hire and fire employees (Matter of Malkin v. Tully, 65 AD2d 228, 412 NYS2d 186; see, Matter of MacLean v. State Tax Commn., 69 AD2d 951, 415 NYS2d 492, 494, affd 49 NY2d 920, 428 NYS2d 675). Other pertinent areas of inquiry include the person's official duties, the amount of corporation stock he owned, and his authority to pay corporate obligations (Matter of Amengual v. State Tax Commn., 95 AD2d 949, 464 NYS2d 272, 273; see, Matter of McHugh v. State Tax Commn., 70 AD2d 987, 417 NYS2d 799, 801).

Summarized in terms of a general proposition, the issue to be resolved is whether petitioner had or could have had sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, Tax Appeals Tribunal, March 27, 1991; Matter of Chin, Tax Appeals Tribunal, December 20, 1990). In addition, and unlike the sales and use tax situation, if petitioner is held to be a person under a duty as described, it must then be decided whether his failure to withhold and pay over such taxes was willful. The question of willfulness is related directly to the

question of whether petitioner was a person under a duty, since clearly a person under a duty to collect and pay over the taxes is the one who can consciously and voluntarily decide not to do so. However, merely because one is determined to be a person under a duty, it does not automatically follow that a failure to withhold and pay over income taxes is "willful" within the meaning of that term as used in Tax Law § 685(g). As the Court of Appeals indicated in Matter of Levin v. Gallman (42 NY2d 32, 396 NYS2d 623), the test is:

> "whether the act, default, or conduct is consciously and voluntarily done with knowledge that as a result, trust funds belonging to the Government will not be paid over but will be used for other purposes . . . . No showing of intent to deprive the Government of its money is necessary but only something more than accidental non-payment is required" (id., 396 NYS2d at 624-625; see, Matter of Lyon, Tax Appeals Tribunal, June 3, 1988).

Finally, "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it for someone else to discharge" (Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301).

I. Without question, petitioner was a person under a duty to collect and pay over the withholding taxes on behalf of Mostel and Taylor Securities, Inc. He was the president of the company and a member of its board of directors. He signed corporate checks and tax returns. He contributed $50,000.00 toward its organization, derived all of his income from and spent all of his time working for the corporation. He owned substantial corporate stock and had the authority to hire and fire employees of the business.

It having been found that petitioner was a person under a duty to collect, truthfully account for and pay over such withholding taxes, it must then be determined whether his failure to do so was willful. The crux of petitioner's argument is that he had entrusted the responsibility for the filing of corporate returns and payment of its tax liabilities to another officer, Leonard Osser, and had instructed him to pay the New York State withholding tax liability of the corporation. In addition, he stated in his brief that, until the morning of the hearing, he believed that his instructions had been followed and that the taxes had been paid over.

J. While a lack of actual knowledge can negate a finding that the act (of failing to collect, truthfully account for and pay over the withholding taxes) was voluntarily and consciously done, a responsible officer's failure can be willful, notwithstanding his lack of actual knowledge, if it is determined that the officer recklessly disregarded his corporate responsibilities including the responsibility to see that taxes were paid (Matter of Capoccia v. State Tax Commn., 105 AD2d 528, 481 NYS2d 476, 477; Matter of Ragonesi v. State Tax Commn., supra; Matter of Flax, Tax Appeals Tribunal, September 9, 1988).

The Tribunal has held that a responsible officer can make a reasonable delegation of authority (Matter of Lyon, supra). In Lyon, the record indicated that the officer to whom fiduciary responsibilities had been delegated was experienced in running the corporation. In addition, the petitioner in that case kept himself informed as to the corporation's operations through regular meetings with such officer and also hired an outside professional, an accountant, to prepare and file corporate tax returns. In the present matter, the record contains no evidence as to Leonard Osser's credentials to perform the functions delegated by petitioner. In fact, there is evidence to suggest that reliance upon Mr. Osser was unjustified inasmuch as Osser had informed petitioner that the company had "a huge Federal tax problem" (see, Finding of Fact "8").

During the time in which petitioner stated that he was attempting to recapitalize the company and then to find jobs for its employees when it was decided to close the business, he took no steps to ensure that Osser was filing returns and paying over the company's withholding taxes. He stated that while he had seen financial statements which indicated that taxes had been paid, he never saw nor asked to see checks or copies of checks evidencing payment.

Examining the totality of the evidence presented leads to the conclusion that this petitioner disregarded his duties to collect and pay over the corporation's withholding taxes by delegating the responsibility therefor to Leonard Osser. Moreover, it should have been obvious to petitioner that, since the corporation was delinquent with respect to its Federal withholding tax obligations, it was his duty to take reasonable steps beyond a simple verbal inquiry to

ascertain whether State taxes had, in fact, been paid as maintained by Leonard Osser. Petitioner's attempt to absolve himself from his fiduciary responsibility by placing the blame on another corporate officer cannot and does not preclude a finding that his his failure to collect and pay over the withholding taxes on behalf of Mostel and Taylor Securities, Inc. was "willful" within the meaning and intent of Tax Law § 685(g) (see, Matter of Capoccia v. State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., supra).

K. The petition of Michael S. Taylor is denied and the Notice of Deficiency dated June 7, 1991 is sustained in its entirety.

DATED: Troy, New York
December 19, 1996

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE